

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD CARDWELL on behalf of	:	
himself and similarly-situated	:	
employees,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 08-cv-5075
	:	
STRYDEN, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM and ORDER

Joyner, J.

May 18, 2009

Plaintiff Donald Cardwell brings the instant motion for court-supervised notice to potential opt-in plaintiffs pursuant to the opt-in procedures of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). For the reasons stated herein, plaintiff's motion will be granted.

While it appears that the parties originally intended to mutually agree on the proposed class and send out opt-in notices without intervention of this Court, a dispute has arisen as to the potential opt-in plaintiffs who will receive notice. It is this Court's "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170-171 (1989). Further, "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b)

(1982 ed.), as incorporated by 29 U.S.C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs."

Id. In light of these responsibilities, we will consider the Plaintiff's Motion for Court-Supervised Notice to Potential Opt-in Plaintiffs and direct court-supervised notice.

There are two requirements for potential plaintiffs to be included in the collective action: plaintiffs must (1) be "similarly situated" and (2) give written consent. 29 U.S.C. § 216(b). Courts engage in a two-step inquiry to determine whether class members are similarly situated for purposes of Section 216(b) of the Fair Labor Standards Act ("FLSA"). *Harris v. Healthcare Servs. Group, Inc.*, No. 06-2903. 2007 U.S. Dist. LEXIS 55221, 2007 WL 2221411, at *6 (E.D. Pa. July 31, 2007) (citations omitted). The first step, the one at hand in the instant motion, is assessed early in the litigation process when there is minimal evidence and places a relatively light burden on plaintiffs to show that potential opt-in plaintiffs are similarly situated. Id.; *Smith v. Sovereign Bancorp, Inc.*, No. 03-2420, 2003 U.S. Dist. LEXIS 21010, 2003 WL 22701017, at *10 (E.D. Pa. Nov. 13, 2003). When discovery is complete, a more fact-specific second-stage inquiry will occur into whether the proposed opt-in class is, indeed, similarly situated. Id.

Courts differ as the requirements of this first step. "Some courts have determined that plaintiffs need merely allege that

the putative class members were injured as a result of a single policy of a defendant employer.” *Bosley v. Chubb Corp.*, No. 04-cv-4598, 2005 U.S. Dist. LEXIS 10974, 2005 WL 1334565, at *7-9 (E.D. Pa. June 3, 2005) (citing *Goldman v. RadioShack*, No. 03-cv-0032, 2003 U.S. Dist. LEXIS 7611, 2003 WL 21250571, at *27 (E.D. Pa. Apr. 16, 2003); *Felix de Ascencio v. Tyson Foods*, 130 F. Supp. 2d 660, 663 (E.D. Pa. 2001); *Sperling v. Hoffman-La Roche*, 118 F.R.D. 392, 407 (D.N.J. 1988), *aff'd* on other grounds, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989)). While, “[o]ther courts have applied a stricter, although still lenient, test that requires the plaintiff to make a ‘modest factual showing’ that the similarly-situated requirement is satisfied.” *Bosley*, 2005 U.S. Dist. LEXIS 7611, at *8-9 (citing *Dybach v. Florida Dep't of Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991); *Mueller v. CBS, Inc.*, 201 F.R.D. 425, 428 (W.D. Pa. 2001); *Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 362 (M.D. Ala. 1999); *Jackson v. New York*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995)). Under either lenient standard, we find that the plaintiff has shown a similarly situated proposed class, meeting the requirements of the first step.

Plaintiff requests that this Court conditionally certify a class of individuals over 40 years of age whose employment as a driver was terminated at or around the end of October 2006 and order that defendant provide names and last known addresses of

all such individuals. Plaintiff further asks that this Court approve proposed language for a Notification Form to be sent to all potential opt-in plaintiffs. Plaintiff has alleged in his Amended Complaint that all of the potential opt-in plaintiffs are similarly situated "in that they are over the age of 40; their employment was terminated when Defendants took over; and they were all replaced by younger drivers." Amend. Comp. 5.

Plaintiff alleges that proposed opt-in plaintiffs were terminated because of their age. The Age Discrimination in Employment Act ("ADEA"), under which plaintiff is proceeding, protects individuals over 40 years of age. 29 U.S.C. § 621, *et seq.* Seven additional members of the proposed class have filed written consent forms pursuant to §16(b) of FLSA, and each is over 40, was employed with defendant as a driver and was terminated at or around October 2006. Plaintiff's Charge of Discrimination with the EEOC lists these other opt-in plaintiffs. Pl. Mot. Brf., Exh. A. These plaintiffs also filed EEOC Selection Questionnaires. Thus, plaintiff has alleged that a group of proposed class members were injured as the result of age discrimination by the defendant and has presented a modest factual showing in demonstrating that at least seven other persons above age 40 were terminated when defendant took over.

Defendants argue that plaintiff has not shown that the "class" is similarly situated and that, as such, the potential

class should include only individuals who are over 60 years old. In arguing that the proposed class is not similarly situated, defendant contends only that the plaintiff has not shown "how individuals ranging in ages between 40 and 84 are similarly situated." Def. Resp. 2. The large range in age is the only argument defendant makes to undermine plaintiff's contention, simply stating that the age range is too large without any other allegation as to why potential opt-in plaintiffs over 40 years of age would not be similarly situated will not derail the proposed class. Based both on plaintiff's allegations and his modest factual showing, we find that the plaintiff has made an adequate showing that potential opt-in plaintiffs are similarly situated. Thus, in line with plaintiff's Amended Complaint, plaintiff's proposed "class" consists of individuals who are over the age of 40 who were not offered driver positions with Defendant Stryden on or about the end of October 2006. Certainly, after discovery has been completed, this Court will conduct a "second-stage" inquiry into the question of whether the potential plaintiffs are, indeed, similarly situated.

Finally, in light of the Amended Complaint and the immediate Motion, we have found that the proposed class to be those individuals over 40 years age. However, this Court acknowledges, that the Joint Discovery Plan submitted to the Court noted the proposed class as those individuals over 60 years of age.

Correspondence between counsel has revealed the constraints that the proposed class of individuals over 40 years of age places on defendant in the discovery process. Thus, we will extend all deadlines in the March 13, 2009 Scheduling Order by ninety (90) days in order that the defendant may be provided adequate time to identify former employees in the proposed class and communicate them to the plaintiff. Counsel for plaintiff and defendant are directed to meet and confer regarding the form and content of the proposed notice to proposed class members and submit this Notification Form to this Court.

An appropriate Order follows.